

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL MAURICE DILLARD,

Defendant-Appellant.

UNPUBLISHED
February 23, 2010

No. 290670
Oakland Circuit Court
LC No. 2008-223566-FC

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to concurrent prison terms of 30 to 60 years for each conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of assaulting a married couple as they were walking along the sidewalk at approximately 8:15 a.m. According to the couple, defendant grabbed the husband around the neck from behind and then stabbed him in the right side and left forearm. Defendant then pulled the wife's purse, causing her to fall to the ground. Defendant attempted to stab the wife, but the husband intervened and was stabbed again instead. Defendant then fled on foot. According to the husband, he was able to see that the stabbing instrument was a screwdriver, and he also saw defendant remove a nylon "do rag" that he was wearing over his face. The wife called 9-1-1.

A responding police officer observed defendant in the vicinity of the robbery. Defendant was running on a nearby street and was carrying a denim purse. He approached a fence, threw the purse over, and continued running through yards and jumping fences. A tracking dog "engaged" defendant's leg as defendant attempted to climb over a privacy fence. After defendant was apprehended, the police found a screwdriver, knit cap, and "do rag" in his pants pockets. The victim's stolen purse was recovered from the yard where the officer saw defendant throw it. At trial, both victims identified defendant as the perpetrator.

The sole defense witness, LaShunda White, mother of defendant's child, testified that defendant left White's grandmother's house between 8:00 and 8:15 a.m. He was wearing a coat, but it was not the coat that the police claimed they confiscated from defendant, or the coat that was identified by the female victim.

On appeal, defendant argues that the prosecutor's questioning and comments during rebuttal argument improperly shifted the burden of proof, thereby violating his constitutional rights. Because defendant did not object to the prosecutor's questioning, that issue is not preserved. Further, although defendant objected to the prosecutor's challenged remark during rebuttal argument, the trial court sustained the objection and issued a cautionary instruction. Defendant did not object to the court's instruction or request any further relief. Under these circumstances, defendant's claim of misconduct based on the prosecutor's remarks is also unpreserved. *People v Fowlkes*, 130 Mich App 828, 835; 345 NW2d 629 (1983). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must establish that an error occurred, that the error was plain (i.e., clear or obvious), and that the plain error affected his substantial rights, i.e., affected the outcome of the proceedings. *Id.* at 763-764.

Defense counsel cross-examined a police officer about the absence of scientific evidence to confirm that defendant was wearing the coat that the police claimed they confiscated from him. On redirect examination, the prosecutor asked, "Do you remember, did you receive a request from defense counsel saying, hey, we got some evidence, can you send it to the lab? Did you receive anything of that nature?" The officer responded, "I did not." In defense counsel's closing argument, counsel asserted that testing was necessary to "dot the I's and cross the T's" to prove the case beyond a reasonable doubt. He also mentioned that he would be requesting instructions on lesser included offenses and explained, "It would be, it's almost malpractice for a defense lawyer not to make these requests in terms of lesser included instructions." Thereafter, during his rebuttal argument, the prosecutor echoed the reference to malpractice to address the absence of scientific testing, leading to the following exchange:

[PROSECUTOR]: Additionally, counsel brought up, he brought up about malpractice saying it'd be malpractice if I didn't request the lesser included. Well, it also would be malpractice if he didn't request the DNA be sent to the lab. It would also be malpractice if he knew his client didn't do this and he didn't send the serological, have that tested. He could have done it.

[DEFENSE COUNSEL]: Your Honor, objection.

[PROSECUTOR]: He didn't want to do it because

[DEFENSE COUNSEL]: I object. The burden of proof is not on the defense, and the burden of proof never shifts to the defense to prove a person's innocence.

THE COURT: Sustained.

[DEFENSE COUNSEL]: I'm going to object.

The prosecutor then turned to another subject and, after the prosecutor concluded his remarks, the trial court cautioned the jury, "I just want to note for the record that the People always have the burden of proof. It never shifts to the defendant."

This case is comparable to *People v Callon*, 256 Mich App 312; 662 NW2d 501 (2003), where the level of defendant's intoxication was established by a blood test. The defendant advanced "a theory that there was a mistake in the custody or the testing of the blood seized by the police." *Id.* at 331. The prosecutor argued that "the blood in the possession of the police was available to defendant for purposes of independent testing" *Id.* at 330. This Court rejected the defendant's contention that the prosecutor shifted the burden of proof and concluded that she "merely attacked the credibility of a theory that defendant advanced at trial" *Id.* at 331. In the present case, the prosecutor's questioning and assertion that defendant could have had the evidence tested was similarly an attack on the theory that defendant advanced at trial and did not "shift the burden of proof." Moreover, to the extent the remark could have been interpreted in this manner, the trial court's cautionary instruction sufficiently reminded the jury that "the People always have the burden of proof. It never shifts to the defendant." Accordingly, defendant has not established a plain error affecting his substantial rights.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis